



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.*)
 KATHLEEN JENNINGS, Attorney)
 General of the State of Delaware,)
)
 Plaintiff,)
)
 v.)
)
 CITY OF SEAFORD, an)
 incorporated municipality of the)
 State of Delaware,)
)
 Defendant.)

C.A. No. 2022- _____ - ____

VERIFIED COMPLAINT

The State of Delaware, *ex rel.* Kathleen Jennings, the Attorney General of the State of Delaware, files this Verified Complaint against the City of Seaford, an incorporated municipality of the State of Delaware, and alleges as follows:

Introduction

1. Through this action, the State asks the Court to declare invalid and preliminarily and permanently enjoin the lifting of the City’s temporary stay of enforcement of a City ordinance entitled “Ordinance Relative to Abortion,” currently scheduled to go into effect on January 22, 2022, because the Ordinance is preempted by State law.

2. The State has, over time, established a comprehensive statutory and regulatory framework to govern the provision of medical services in the State relating to the termination of pregnancies, including the treatment of fetal tissue resulting from stillbirths, miscarriages, or abortions.

3. It is well-settled that the legislative authority granted to municipalities in this State under the Home Rule Act is limited, and must yield to State laws and regulations of general applicability and statewide concern. This preemption happens not only when municipal legislation explicitly conflicts with State law, but also when the State, as sovereign, has enacted comprehensive laws on a subject matter and thus occupied the entire field of regulation. Here, the State has enacted comprehensive laws and regulations concerning the provision of medical services, including reproductive healthcare, the treatment of both human remains and medical waste (including fetal tissue following an abortion or miscarriage), and the reporting of pregnancy terminations (both abortions and stillbirths) to the Division of Public Health. The City may disagree with the State's policy choices, but it cannot disregard them.

4. And yet that is exactly what the City has done. Through the Ordinance, the City has enacted a municipal law that directly conflicts with the State's sovereign ability to enact laws that uniformly regulate matters of statewide concern. *First*, the State's regulation of the disposal of human remains and fetal tissue is comprehensive and leaves no room for the City to supplement. *Second*, the Ordinance actually conflicts with the State's carefully considered statutory and regulatory framework regarding reproductive healthcare: the Ordinance disregards the State's deliberate differentiation between pre- and post-viability pregnancy terminations, conflicts with State laws establishing standards for State-regulated healthcare facilities, demands

that healthcare providers file reports with State agencies that are not permitted by State law, and makes it unreasonably difficult—if not impossible—for medical facilities, funeral directors, and crematory operators to handle fetal tissue in the manner required by State law while also complying with the Ordinance.

5. The City purports to do this under the guise of ensuring that a pregnant person has the “right” to determine the disposition of fetal tissue resulting from a termination of pregnancy (whether via miscarriage or an abortion), but the reality is the Ordinance is but one part of a nationwide effort by interest groups to make it more difficult and costly for pregnant persons to be able to receive lawful reproductive healthcare services, and more difficult for healthcare providers to provide those services.¹ While the City appears to be the first municipality to try to extensively regulate the disposition of fetal tissue, seventeen states have done so, and interest groups dedicated to eradicating the right to abortion nationwide track and rate states based on whether they have enacted such laws. While these efforts, and the City’s willing role in them, raise significant concerns regarding a pregnant person’s right to make important and private reproductive decisions free from undue government coercion, the Court does not need to address those concerns in

¹ See, e.g., *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, ___ U.S. ___, 139 S. Ct. 1780 (2019) (rejecting rational basis challenge to Indiana fetal tissue restriction); *Hopkins v. Jegley*, 510 F. Supp. 3d 638, 787-88 (E.D. Ark. 2021) (preliminarily enjoining Arkansas fetal tissue disposal law), *appeal pending*, No. 21-1068 (8th Cir.); *Whole Woman’s Health v. Smith*, 338 F. Supp. 3d 606, 642-43 (W.D. Tex. 2019) (striking down Texas fetal tissue requirements), *appeal pending*, No. 18-50730 (5th Cir.).

order to grant the State the relief requested—namely, a declaration that the Ordinance is invalid because it is preempted by State law, and a preliminary and permanent injunction prohibiting the lifting of the City’s temporary stay of the enforcement of the Ordinance or, in the alternative, prohibiting the Ordinance’s effectiveness and enforcement.

The Parties

6. Plaintiff State of Delaware is a sovereign state of the United States of America, and brings this action by and through Kathleen Jennings, the Attorney General of the State of Delaware. As the Chief Law Officer of the State, the Attorney General is empowered and charged, both at common law and by statute, with the duty to represent as counsel in all proceedings or actions which may be brought on behalf the State and all officers, agencies, departments, boards, commissions, and instrumentalities of the State.

7. Defendant City of Seaford is an incorporated municipality of the State of Delaware. Its principal offices are located at 414 High Street, Seaford, Delaware 19973. Pursuant to Section 4(A) of its Charter,² the City “may sue and be sued . . . in all Courts of law and equity in the State of Delaware, and elsewhere, by said corporate name.”

Jurisdiction

8. The Court has subject matter jurisdiction over this matter in accordance with 10 *Del. C.* § 341.

² Charter of the City of Seaford, <http://charters.delaware.gov/seaford.shtml>.

Factual Allegations

I. Planned Parenthood Opens a Health Center in the City

9. On August 24, 2021, Planned Parenthood of Delaware, Inc. confirmed what for months had been an open secret in Sussex County: it was opening a new health center in Seaford, the reproductive health and family planning organization's first health center in Sussex County since a Rehoboth Beach location closed in September 2011, and only the second health center on the Delmarva Peninsula south of Dover.

10. Opponents of Planned Parenthood had already been protesting at the site on a weekly basis for months, and they submitted complaints to the Seaford City Council criticizing the health center's planned opening. According to media reports, the City's Mayor noted (correctly) that the City could not prevent the health center from opening if the building complied with code requirements.³ But the City did not sit by quietly.

II. The City Unveils the Ordinance

11. In September 2021, the City published the agenda for the September 28, 2021 regular meeting of the Mayor and Council. Listed as the first item of new business was “[p]resent for a first reading an ordinance to be added to Chapter 8 - Morals and Conduct of the City Municipal Code: Article 9, an ordinance relative to abortion to establish a process for the disposition of

³ Natalia Alamdari, *Planned Parenthood Is Returning to Sussex County—The Backlash Has Already Begun*, The Wilmington News Journal (Aug. 24, 2021), <https://tinyurl.com/yuve8t9s>.

fetal remains from pregnant women seeking abortion within the City of Seaford.” (The September 28 meeting agenda is attached as Exhibit A.⁴)

12. At the September 28 meeting, Council considered the draft ordinance, asking the City Solicitor a variety of questions regarding the draft ordinance’s terms and its purported validity under State law and existing United States Supreme Court precedent. (The September 28 meeting minutes are attached as Exhibit B.)

13. The draft ordinance was then placed on the agenda for the October 12, 2021 regular meeting of the Mayor and Council. (The October 12 meeting agenda is attached as Exhibit C.) However, prior to the meeting, the City received correspondence from the Delaware Department of Justice and the American Civil Liberties Union of Delaware, Inc. raising concerns with the draft ordinance’s preemption by State law and its unconstitutionality. (Copies of the Delaware Department of Justice’s and ACLU of Delaware’s letters are attached as Exhibit D and Exhibit E, respectively.) At the October 12 meeting, in response to the concerns expressed by the Delaware Department of Justice and the ACLU of Delaware, Council tabled the proposed ordinance for further consideration. (The October 12 meeting minutes are attached as Exhibit F.)

14. Thereafter, three Council meetings (October 26, November 9, and November 23) passed with no public update regarding the proposed ordinance. Then, the City placed the proposed ordinance on the agenda for the December

⁴ Copies of all agendas and minutes for Council meetings attached to this Complaint were obtained from the City’s “Council Agendas & Minutes” webpage (<https://tinyurl.com/4dnfssh4>).

14, 2021 regular meeting of the Mayor and Council. (The December 14 meeting agenda is attached as Exhibit G.) The agenda for the meeting attached a revised proposed ordinance, both a “clean” copy and a “marked” copy purporting to show changes from the prior draft of the proposed ordinance.

15. Shortly before the December 14 meeting, the Delaware Department of Justice and a coalition of groups including the ACLU of Delaware submitted additional correspondence raising concerns with the draft ordinance’s preemption under State law and its unconstitutionality. (Copies of the letters are attached as Exhibit H and Exhibit I, respectively.) Council enacted the Ordinance at the meeting. The Mayor also informed the other members of Council and the public that the City had private money available, from an individual who wants to remain anonymous, to fund any litigation that might be brought against the City over the Ordinance,⁵ raising a concern that the City is being used to further outside agendas both in bringing forth and in defending any litigation over the Ordinance.

16. As enacted,⁶ the Ordinance purports to include the following requirements:

⁵ See Emily Lytle, *How Seaford’s New Abortion Ordinance Affects Pregnant Patients, Providers, and the State*, The Wilmington News Journal (Dec. 17, 2021), <https://tinyurl.com/3e43cwes>.

⁶ Because the City Code ties the Ordinance’s effectiveness to its publication, and the “as published” version of the Ordinance does not appear to be available online, the State asked the City on December 31, 2021 for a copy of the Ordinance as published, but did not receive it before filing the Complaint. For purposes of this Complaint, the State has thus assumed that the Ordinance enacted by Council and published on December 23 is the clean copy of the Ordinance attached to Council’s December 14 meeting agenda (Ex. G at 22-

a. All fetal tissue resulting from a “Miscarriage” or a “surgical Abortion,” regardless of the weight of the fetus or the duration of the pregnancy at the time the pregnancy ended, must be cremated or interred. (Ordinance, § 8.9.4, Ex. G at 22.)

b. The pregnant person must choose between cremation or interment, with the treating facility at which the “Miscarriage” or “surgical Abortion” occurs making the choice if the pregnant person declines to choose. (Ordinance, §§ 8.9.5, 8.9.6, Ex. G at 22-23.)

c. The pregnant person or the treating facility at which the “Miscarriage” or “surgical Abortion” occurs must pay the costs of cremation or interment. (Ordinance, § 8.9.11, Ex. G at 24.)

d. The treating facility, if it is an “Ambulatory Surgical Treatment Center” (which is any facility that provides medical or surgical abortions, including not only Planned Parenthood but also potentially TidalHealth Nanticoke Hospital) “shall not provide beds or other accommodations for the stay of a patient to exceed twelve (12) hours duration,” unless an attending physician, medical director, or anesthesiologist deems it medically necessary for the patient to remain past that point, “but in no event shall the length of the stay exceed twenty-four (24) hours.” (Ordinance, § 8.9.13, Ex. G at 25.)

28), and citations to the Ordinance in this Complaint are to that version. But the issue is not entirely clear, because there are material discrepancies between the clean and marked copies of the Ordinance attached to the December 14 agenda, including in Section 8.9.4, the Ordinance’s foundational requirement that all fetal tissue be cremated or interred. *Contrast* Ex. G at 12 *with id.* at 22.

e. The treating facility or physician must, within ten days after an abortion is performed, prepare and file a report with the Division of Public Health's Office of Vital Statistics identifying whether the abortion was a surgical procedure (and, if so, what kind) and whether the fetal tissue was cremated or interred or transferred to a third party for disposition. (Ordinance, § 8.9.16, Ex. G at 26.)

17. Under Section 1.1.8 of the City Code,⁷ the Ordinance is scheduled to go into effect on January 22, 2022, thirty days following its purported December 23, 2021 publication. On December 22, 2021, following public statements from the Delaware Department of Justice and the ACLU of Delaware that they intended to file litigation challenging the validity of the Ordinance, the City published an agenda for a December 30, 2021 special meeting of the Mayor and Council to consider a proposal to “stay enforcement” of the Ordinance. (A copy of the December 30 meeting agenda is attached as Exhibit J.)

18. At the December 30 meeting, Council voted to stay the enforcement of the Ordinance, but not the Ordinance's effectiveness. According to media reports (minutes for the December 30 meeting are not yet publicly available), the City's reason for implementing this enforcement stay is its expectation that at some point before the end of June, the General Assembly might enact, and the Governor would sign, hypothetical legislation that, depending on its contents, might affect the City's ability to maintain and

⁷ Available on the City's website at <https://tinyurl.com/2336d5eb>.

enforce the Ordinance.⁸ The City provided no specifics as to what kind of legislation would be sufficient to satisfy Council. The Mayor made it clear that “this stay can be lifted at any time that council chooses,” that Council will “probably” do so if the General Assembly and the Governor do not enact legislation within six months, and that he “would like to think they would act quickly, but they probably won’t.”⁹

III. Delaware Law Already Comprehensively Regulates the Subject Matters Addressed by the Ordinance

19. In adopting the Ordinance, the Council attempted to frame the issue as one where the City, as a Home Rule Act municipality, is simply legislating on a subject matter Delaware law does not already address. At the September 28 Council meeting, the City Solicitor claimed that the City could enact the Ordinance because “there is no specific Delaware law that requires the woman or facility to choose one of these two methods for disposal.” (Ex. B at 4.) And in the Ordinance itself, the City insists that the State “has not, by statute or regulation, expressed an intent to regulate the disposition of fetal remains.” (Ordinance, § 8.9.2.F.1, Ex. G at 21.) As a result, the City seems to claim, this purported lack of Delaware law regulating the treatment and disposition of fetal tissue means both that the City is permitted to enact the Ordinance, and that any efforts by the State to block the City must occur legislatively.

⁸ See Glenn Rolfe, *Seaford’s Disposal of Fetal Remains Ordinance Put on Indefinite Hold*, Bay to Bay News, Dec. 30, 2021, <https://tinyurl.com/bdd53ah8>.

⁹ *Id.*

20. Not so. As explained in the following paragraphs, the State has in fact already enacted comprehensive laws to regulate the disposition of fetal tissue (and human remains), as well as other subjects addressed by the Ordinance—*i.e.*, the oversight of medical facilities providing healthcare services (including abortions), and the reporting of pregnancy terminations (both abortions and stillbirths) to the State. The Ordinance is therefore already preempted and invalid under Delaware law, and legislative action to invalidate the Ordinance is unnecessary.

A. State Law Comprehensively and Exclusively Regulates the Disposition of Human Remains and Fetal Tissue

21. State law comprehensively regulates the treatment and disposition of human remains and human anatomical remains, including fetal tissue. It does so in two ways. *First*, State law extensively regulates the treatment and disposition of human remains, including what qualifies as human remains and may lawfully be cremated or buried, which does not include fetal tissue less than 350 grams weight or prior to twenty weeks gestation. *Second*, State law extensively regulates the treatment and disposition of solid waste, including pathological waste, which includes fetal tissue. Taken together, these laws occupy the field, and there is no room for municipal legislation on the subject.

1. Treatment and Disposition of Human Remains

22. Turning first to the treatment and disposition of human remains, the operative provisions start with Chapter 31, Title 16 of the Delaware Code (“Code”), which addresses the registration of births, deaths, and other major life

events (Subchapter II) and the burial, removal, or cremation of dead bodies (Subchapter III).

23. The Department of Health and Social Services “is charged with the uniform and thorough enforcement of [Chapter 31] throughout the State and shall from time to time promulgate any additional forms and regulations that are necessary for this purpose.” 16 *Del. C.* § 3102(b). This is a specific aspect of DHSS’s more general authority to supervise “all matters relating to the preservation of the life and health of the people of the State,” 16 *Del. C.* § 122(1), and its authority to promulgate regulations, “which shall be enforced by all state and local public health officials,” to “[p]rotect and promote the public health generally in the State, and carry out all other purposes of the laws pertaining to the public health,” 16 *Del. C.* § 122(3)j. And to ensure that DHSS has the ability to implement public health measures on a statewide basis, Delaware law charges, among others, all “officers and employees of the State, or any county, city or town thereof” with the duty to enforce “such rules, regulations and orders as are adopted by [DHSS].” 16 *Del. C.* § 127.

24. Chapter 31 of the Code defines a dead body as “a lifeless human body or such parts of such human body from the condition of which it may reasonably be concluded that death recently occurred.” 16 *Del. C.* § 3101(1). This includes “any products of human conception expelled weighing 350 grams or more, or after twenty (20) weeks of gestation.” 16 *Del. Admin. C.* 4204, § 1.0.

25. State law regulates the practice of cremation. A cremation cannot take place without a cremation permit, such a permit cannot be issued without a death certificate, and a death certificate is only issued for a dead human body. 16 *Del. C.* §§ 3123, 3157, 3159; 24 *Del. Admin. C.* § 13.2.

26. Similarly, State law regulates the burial of dead bodies, whether as corpses or cremated remains. In either case, the dead body cannot be buried without a burial (or cremation) permit, such a permit cannot be issued without a death certificate, and a death certificate can only be issued for a dead human body. This includes spontaneous fetal deaths (stillbirths) when the fetus weighs 350 grams or more or (if weight cannot be determined) there has been twenty weeks of completed gestation. 16 *Del. C.* §§ 3123, 3124, 3151, 3152; 16 *Del. Admin. C.* 4204, §§ 2.0, 3.0.

2. Treatment and Disposition of Pathological Waste, Including Fetal Tissue

27. State law defines pathological waste as “all human tissues and anatomical remains, including fetal tissue, which emanate from surgery, obstetrical procedures, autopsy, and laboratory procedures.” Pathological waste is a form of infectious solid waste. 7 *Del. Admin. C.* 1301, §§ 3.0, 11.3.

28. State law vests exclusive authority over the treatment and handling of solid waste in the Department of Natural Resources and Environmental Control. 7 *Del. C.* § 6025(a). Pursuant to its regulatory authority, DNREC has promulgated 119 pages of regulations regarding the management and disposal of solid waste. 7 *Del. Admin. C.* 1301. Pathological waste—including

anatomical remains (itself including fetal tissue)—must “be incinerated, cremated or interred in accordance with 24 Del. C. Ch. 31.” *Id.*, § 11.11.2.

29. DNREC’s reference to Title 24, Chapter 31 is significant here, because that statute establishes the Board of Funeral Services, which oversees those individuals in the State who are responsible for interments and cremations (Subchapter I), sets forth licensing and permitting requirements for funeral directors (Subchapter II), and establishes other provisions regarding the provision of funeral services anywhere in the State, including the cremation of human remains (Subchapter III). This chapter defines burial as “the interment of human remains” and “cremation” as “the process of burning human remains to ashes,” and elsewhere indicates—consistent with the provisions of Title 16, Chapter 31 of the Code—that “human remains” means a dead body. *See 24 Del. C. § 3101(2), (3), (5), (7).*

30. Chapter 31 also directs the Board of Funeral Services to promulgate rules and regulations to implement the purposes of the chapter, including maintaining standards in the delivery of services to the public throughout the State. *24 Del. C. §§ 3100(b)(4), 3105(a)(1).* Pursuant to that authority, the Board has promulgated a variety of regulations regarding the provision of funeral services in the State and the supervision of funeral directors, including licensing, ethics, continuing education, advertising standards, establishment permits, and cremation procedures. *24 Del. Admin. C. 3100.* These regulations limit cremation to dead bodies (*24 Del. C. 3100,*

§§ 13.1, 13.2), meaning they do not allow for the cremation of fetal tissue prior to 350 grams weight or twenty weeks gestation (*see* ¶ 24, *supra*).

31. Taken together, State law regarding the cremation and burial of human remains, and State law regarding the disposition of pathological waste, establish a comprehensive, bifurcated, and exclusive framework, one that is similar to the State’s deliberate differentiation between pre- and post-viability abortions in the State’s Termination of Human Pregnancy Act (Title 24, Chapter 17, Subchapter IX of the Code): fetal tissue resulting from a stillbirth or an abortion occurring at or after 350 grams of weight or twenty weeks gestation may lawfully be buried or cremated, but fetal tissue resulting from a stillbirth or an abortion occurring before 350 grams weight or twenty weeks gestation may *not* lawfully be cremated or buried.

B. Healthcare Facilities Providing Reproductive Healthcare Services Are Comprehensively Regulated Under State Law

32. State law also extensively regulates healthcare facilities, including those that provide reproductive healthcare, including abortions.

33. As previously noted (¶ 23, *supra*), DHSS is charged by State law with the duty to supervise “all matters relating to the preservation of the life and health of the people of the State.” 16 *Del. C.* § 122(1). This broad duty to protect the public health includes duties to establish uniform standards:

a. “for quality assurance in the operation of freestanding birthing centers, freestanding surgical centers, and freestanding emergency departments” (16 *Del. C.* § 122(3)p);

b. “with respect to safety and sanitary conditions” at facilities where “office-based surgeries,” including surgical abortions, are performed (16 *Del. C.* § 122(3)y);

c. “for a facility accreditation program” (16 *Del. C.* § 122(3)z); and

d. “governing the construction, maintenance and operation of hospitals to protect and promote the public health and welfare” (16 *Del. C.* § 1002(a)).

34. In order to discharge its standard-setting duties, as previously noted, DHSS is charged with the obligation to promulgate regulations, “which shall be enforced by all state and local public health officials,” to “[p]rotect and promote the public health generally in the State, and carry out all other purposes of the laws pertaining to the public health.” 16 *Del. C.* § 122(3)j. And to ensure that DHSS can implement public health measures on a statewide basis, Delaware law charges, among others, all “officers and employees of the State, or any county, city or town thereof” with the duty to enforce “such rules, regulations and orders as are adopted by [DHSS],” and imposes civil penalties if they fail to do so. 16 *Del. C.* § 127.

35. Surgical abortions in the State can be provided either at hospitals or at office-based surgery facilities. With respect to hospitals, DHSS has promulgated regulations regarding the construction, maintenance, and operation of all hospitals within the State, including TidalHealth Nanticoke Hospital in the City. *See* 16 *Del. Admin. C.* 4407. With respect to office-based surgery

facilities, including Planned Parenthood health centers where surgical abortions are performed, DHSS has promulgated extensive provisions regarding patient care (16 *Del. Admin. C.* 3335, §§ 3.1–3.9)—including specific requirements for discharging patients (§ 3.8)—as well as reporting requirements (*id.*, § 4.3), and disclosure requirements regarding patient rights (*id.*, §§ 7.1–7.2).

36. Taken together, these State laws demonstrate the State’s intent that there be a comprehensive, consistent, and statewide regulation of healthcare facilities in the State, including hospitals and office-based surgery facilities.

C. Reporting of Abortions and Stillbirths Is Extensively Regulated Under State Law

37. State law comprehensively regulates both the reporting of abortions (induced pregnancy terminations) and stillbirths (spontaneous fetal deaths).

38. Abortions must be reported to the Division of Public Health’s Health Statistics Center “regardless of the length of gestation.” 16 *Del. C.* § 3133. Such reporting must occur within 30 days after the end of the month in which the abortion was performed. *Id.* These reports can be used “only for purposes of statistical analysis and shall not be incorporated into the permanent official records of the system of vital statistics.” *Id.* The reporting form can include “only those items recommended by the federal agency responsible for national vital statistics except that it shall not include any item that allows identification of patients or physicians.” *Id.* Finally, the statute provides that “no statistical analysis shall be released which identifies the reporting institution or abortion facility.” *Id.*

39. Stillbirths must also be reported to the Division of Public Health if the fetus weighs 350 grams or more or passed at least twenty weeks gestation. 16 *Del. C.* § 3124. The report of fetal death must be filed with the Office of Vital Statistics within three days after delivery. *Id.* Abortions may not be reported as spontaneous fetal deaths. *Id.*

Claims for Relief

Count I: Preemption

40. The State incorporates paragraphs 1 through 39 of the Complaint as if fully set forth herein.

41. The City is a Home Rule Act municipality pursuant to 22 *Del. C.* § 802. The purpose of Home Rule Act authority is to enable qualifying municipalities to exercise sovereignty within their borders, except as limited by the Delaware Constitution or State law. These limitations prohibit municipalities from legislating on matters where the State has explicitly or impliedly occupied the field of regulation, where the municipal legislation would be inconsistent with or hinder the objectives of State law, or where the municipal legislation would govern a civil relationship that is not incident to an exercise of municipal power.

42. In the Ordinance, the City claims it has the power to legislate on the subject matters covered by the Ordinance because the State “has not, by statute or regulation, expressed an intent to regulate the disposition of fetal remains.” (Ordinance, § 8.9.2.F.1, Ex. G at 21.) This is false. The Ordinance is in fact preempted by State law, including 7 *Del. C.* ch. 60, 16 *Del. C.* chs. 1, 10,

and 31, 24 *Del. C.* ch. 31, and regulations duly adopted pursuant to authority granted by the foregoing provisions of the Code, in at least the following ways:

a. ***Disposition of Human Remains and Fetal Tissue.*** State law comprehensively regulates the disposition of human remains and human tissue, including anatomical remains and fetal tissue. By doing so, the State has so regulated the subject matter that it has occupied the field and there is no room for municipal legislation on the subject. But even if the State has not fully occupied the field, preemption also exists because the Ordinance, by decreeing that all fetal tissue resulting from a “Miscarriage” or a “surgical Abortion” must be either cremated or interred—regardless of the weight of the fetus or the duration of the pregnancy at the time the pregnancy ended—clearly and unambiguously conflicts with the State’s regulatory framework and will make it unreasonably difficult—if not impossible—for medical facilities, funeral directors, and crematory operators to handle fetal tissue in the manner required by State law while also complying with the Ordinance.

b. ***Regulation of Healthcare Facilities.*** State law also comprehensively regulates both hospitals and healthcare providers who perform medical procedures, including surgical abortions, at office-based surgery facilities. By imposing additional requirements on these facilities, including prohibiting these facilities from providing beds or other accommodations to patients for a stay exceeding twenty-four hours’ duration, regardless of medical need, the Ordinance clearly and

unambiguously conflicts with this comprehensive State regulatory framework and is therefore preempted.

c. ***Regulation of Reporting of Fetal Death.*** State law also comprehensively regulates the reporting of abortions and stillbirths. It specifies the State agency to which reports must be made, how quickly reporting must take place, and what categories of information may be reported to the designated State agency. By doing so, the State has so regulated the subject matter that it has occupied the field and there is no room for municipal legislation on the subject. This remains true even assuming a municipality's authority under the Home Rule Act allows it to interfere with the State's power and authority to decide what information State agencies should receive and process regarding fetal deaths.¹⁰ But even if the State had not fully occupied the field, preemption also exists: by requiring healthcare service providers to file reports with the Office of Vital Statistics that are not permitted by State law, to do it on a schedule substantially different from (and incompatible with) what State law provides, and to the wrong State office (the Office of Vital Statistics, instead of the Health Statistics

¹⁰ If compliance with this part of the Ordinance will require the Division of Public Health to spend State funds or use State employee work hours in excess of those already allocated for, the Ordinance may violate Article VIII, Section 6 of the Delaware Constitution, which prohibits the expenditure of State funds except pursuant to an appropriation by the General Assembly, and would therefore be beyond the City's authority to enact. *See 22 Del. C. § 802.*

Center), the Ordinance clearly and unambiguously conflicts with State law, and is therefore preempted.

43. The Ordinance’s severability clause (Section 8.9.18) cannot save any part of the Ordinance because even those parts of the Ordinance that might not explicitly conflict with or be preempted by State law are inextricably intertwined with those that are—including the Ordinance’s foundational requirement that all fetal tissue must be cremated or interred (Section 8.9.4)—and would not have been enacted without the provisions that are preempted.

44. The State lacks an adequately remedy at law.

Prayer for Relief

WHEREFORE, the State respectfully requests that this Court grant the following relief:

A. A declaratory judgment stating that the Ordinance is invalid, null, and void in its entirety;

B. A preliminary and permanent injunction against the City, and its officers, agents, employees, and all other persons acting in concert with them, prohibiting the lifting of the City’s temporary stay of the enforcement of the Ordinance or, in the alternative, prohibiting the effectiveness and enforcement of the Ordinance;

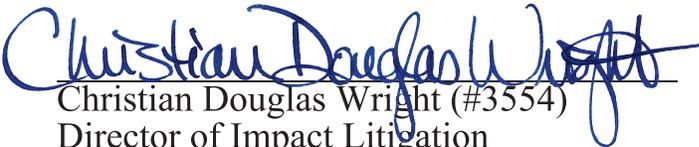
C. An order awarding the State its costs in this action; and

D. An order awarding such other and further relief as the Court may deem just, proper, and equitable.

Dated: January 11, 2022

Respectfully submitted,

STATE OF DELAWARE
DEPARTMENT OF JUSTICE



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